UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:

JOSEPH K. ABBOTT,

Debtor

Chapter 13
Case No. 01-17874-WCH

MEMORANDUM OF DECISION

I. Introduction

The matter before the Court is the Motion to Establish that Pre-Petition Arrearage Due Equicredit Corporation Has Been Paid In Full (the "Motion"). By the Motion, Joseph K. Abbot (the "Debtor") seeks a determination that he has fully satisfied the pre-petition arrearages and other claims of EquiCredit Corporation ("EquiCredit"), the holder of the first mortgage on the Debtor's residence (the "Property"). Select Portfolio Servicing, Inc. ("Select"), the servicer of the EquiCredit mortgage, filed its objection to the Motion (the "Objection") on the grounds that the Debtor continues to owe an additional amount for pre-petition arrearages. I held a hearing on the Motion and Objection and took the matter under advisement.

II. Facts

On November 22, 1999, the Debtor executed a note to EquiCredit (the "Note") that provided for a $238,500 loan for the purchase the Property.[1] The Note was secured by a mortgage on the Property.

[1]EquiCredit Mortgage Note, Motion, Ex. A.

The Debtor filed a Chapter 13 bankruptcy on October 11, 2001. In Schedule A, the Debtor listed the Property which he described as a three family house, valued at $295,000 and subject to secured claims of $268,376.00. The Debtor listed EquiCredit in Schedule D as the holder of a first mortgage on the Property with a claim for $264,789.[2]

The Debtor's first Chapter 13 plan ("Plan I") provided for payment of EquiCredit's arrearage of $27,639.53 through Plan I and of principal through regular monthly post-petition mortgage payments outside of Plan I. In Plan I, the Debtor created a separate subsection for Equicredit which provided, in part, as follows: "This plan provides to cure delinquent pre-petition arrears as may hereinafter be allowed." No objections to Plan I were filed and I entered an order confirming the Plan on January 23, 2002.

After the Debtor filed Plan I, EquiCredit filed a proof of claim in the amount of $250,396.07.[3] The proof of claim provided that the secured claim included a pre-petition arrearage of $13,522.87. In the printout attached to the proof of claim, Equicredit listed arrears of $13,552.87 and a principal balance of $236,843.

The Debtor filed his Post-Confirmation First Amended Chapter 13 Plan ("Plan II") in order to address the discrepancies between the claims listed in Plan I and the proofs of claims. Plan II provided for the payment through Plan II of Equicredit's arrearage claim in the reduced amount of $13,552.87 and monthly mortgage payments to be paid outside of Plan II. No objections were filed and I entered an order confirming Plan II on June 4, 2002. The Debtor

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[2]Debtor's Schedule D, Docket No. 6.

[3]Claims Register, Claim No. 3.

completed Plan II on August 18, 2005.[4] On August 29, 2005, the Debtor filed the Motion. The Debtor was discharged on September 30, 2005.

In the Motion the Debtor set forth many of the forgoing facts. He further explained that under the mortgage the Debtor is responsible for the payment of real estate taxes and property insurance. The Debtor contends that in a 2005 monthly mortgage statement, Select represented that it is owed arrearages of $21,393.57 and holds a negative escrow balance of $7,880. The Debtor appended a copy of the statement to the Motion but inadvertently failed to include page 2 of the statement. The Debtor then requested that the Court

> . . . establish that EquiCredit has received $13,552.87 in full payment for all pre-petition arrears shown to be due on its proof of claim and that it is now prohibited from seeking recovery for anything in excess of the $13,522.87 heretofore paid for pre-petition arrears on the mortgage.[5]

Select filed the Objection in which it agreed that it had been paid the arrearages set forth in Plan II. Select further stated that the Debtor owes it $16,768.86 for accrued interest for deferred pre-petition mortgage payments. Select also alleged that the Debtor owes it $3,991.11 for real estate taxes which it paid in July of 2002 and informed the Debtor of eight months later. Select explained that the Debtor is three months in arrears post-petition and owed $150 in post-petition NSF fees. Lastly, Select alleged that it is owed post-petition property preservation expenses of $1,848.75.

At the hearing on the Motion and Objection, the Debtor argued that the proof of claim speaks for itself and that Select can not now seek payment of additional pre-petition funds.

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[4]Trustee's Report and Account, Docket No. 59.

[5]Motion, Docket No. 49, p. 3.

Select explained that shortly after the parties signed the note and mortgage, the Debtor defaulted twice. After each default, the parties entered into an agreement whereby Equicredit took "the then new accrued interest that was in default and put that at the end of the loan by written agreement."[6] Select stated that this deferred payment agreement is represented in the principal balance of the proof of claim.

I took the Motion and Objection under advisement as it appeared that they presented an issue similar to one I addressed in *In re Searcy*, 333 B.R. 617, 623 (Bankr. D. Mass. 2005) (ruling Chapter 13 plan sufficiently vague so as to not modify secured claim). After having reviewed the facts of this case, it appears that the issues for determination are twofold. The first is whether Select is entitled to payment for the arrearages from the workout agreements and the second issue is whether EquiCredit is entitled to payment of post-petition fees and expenses.

III. Analysis

A creditor's claim is deemed allowed unless objected to by a party in interest. 11 U.S.C. § 502(a). Moreover, the Debtor and EquiCredit are bound by the terms of a confirmed plan. 11 U.S.C.§ 1327(a). At the hearing, Select appeared to argue that the claim of $250,396 in their proof of claim included the original principal and the deferred claim. That is, however, incorrect. The attachment to the proof of claim provides that at the time of the filing of the proof of claim, EquiCredit considered the principal to be $236,843, approximately $2,000 less than the original note amount. Therefore, Equicredit did not include the amounts of their workout agreements in the proof of claim. Not only did EquiCredit not include those amounts in the proof of claim, it did not object to the Debtor's failure to include them in Plan I or Plan II. To the extent that the

[6]Transcript, December 15, 2005, p. 3.

Debtor was modifying the claim by way of Plan I or Plan II by not listing the workout agreement amounts or by explaining that he was curing delinquent pre-petition arrears, he was successful.[7] *See In re Searcy*, 333 B.R. 617, 623 (Bankr. D. Mass. 2005) ("I believe that provisions in an adequately noticed Chapter 13 plan which modify the rights of a secured creditor are the functional equivalent of a claims objection under § 502(a).") Accordingly, the discharge order prevents EquiCredit from seeking to be reimbursed for any pre-petition arrearage amounts not otherwise listed in Plan I and Plan II or in its proof of claim.

The second issue presented is as to certain additional post-confirmation charges: a negative escrow balance, three monthly mortgage payments, real estate taxes, NSF fees and a property preservation expense. Unfortunately, I have insufficient information regarding the nature of these charges to determine whether they are appropriate or run afoul of 11 U.S.C. §§ 362(a), 364, 1305, 1327 and MLBR 4001-2 and 13-15. Accordingly, I will schedule an evidentiary hearing to consider the nature and amounts of these charges in order to consider whether the Debtor is responsible for their payment.

[7]The Property was a three family residence and therefore the claim could be modified. See 11 U.S.C. § 1322(b)(2).

IV. Conclusion

For the foregoing reasons, I will enter an order granting the Motion in part as to the pre-petition arrearages. I will hold an evidentiary hearing to consider those additional fees which the parties described in the Motion and Objection.

William C. Hillman
United States Bankruptcy Judge

Dated: 2/13/06
For the Debtor, Joseph P. Foley, Boston, MA.
For Select, Deirdre M. Keady, Harmon Law Offices, Boston, MA.